APPEAL NO. 92512

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On May 1, 1991, claimant did not attend a contested case hearing that was held to determine average weekly wage (AWW). The appeals panel remanded because the record did not contain evidence showing that notice was given to claimant of the May 1, 1992 hearing. *See* Texas Workers' Compensation Commission Appeal No. 92237, dated July 22, 1992. The hearing on remand was held on August 26, 1992, in (city), Texas. The hearing officer, with claimant in attendance, held that the AWW was $277.56. Appellant, claimant herein, asserts that his AWW should be considered to be $760.00 and that various procedural requirements were not met. Respondent, carrier herein, timely replied that the AWW was correctly found to be $277.56.

DECISION

Finding that the decision on remand is not so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm.

Claimant hurt his back and hand on (date of injury) when working in a mattress factory. He had worked for this employer in the past but started the current period of work on April 25, 1991. The employer provided a wage statement for claimant for the 13 weeks immediately preceding the injury. In that period, which is the time specified for determining AWW, claimant worked more than 30 hours in all but three weeks. Two of the three weeks that totalled less than 30 hours were influenced by claimant's suspension from work without pay for five days for fighting. Claimant testified that during the other week in question, he was instructed to skip a day of work because of a work scheduling change involving alternate days--had he worked that day, he would have worked over 30 hours in that week too. Claimant was only absent for sickness one day in the 13 week period.

Applicable statutory provisions and rules include Article 8308-4.10(a)and (g) and Tex. W. C. Comm'n, 28 TEX ADMIN CODE §128.3(a) and (d) (Rule 128.3(a) and (d)). They read, respectively, as follows:

> Except as otherwise provided by this section, if the employee has worked for the employer for at least 13 consecutive weeks immediately preceding the injury, the average weekly wage of an employee shall be computed as of the date of the injury and equals the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury divided by 13.

> If the methods adopted under subsections a and b of this section cannot be applied reasonably due to the irregularity of the employment or if the employee has lost time from work during said 13 week period due to illness, weather, or other cause beyond the control

of the employee, the commission may determine the employee's average weekly wage by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

All income benefits for full time employees are based upon an average weekly wage calculated according to this rule. A full time employee is one who regularly works at least 30 hours per week and that schedule is comparable to other employees of that company and/or other employees in the same business or vicinity who are considered full time.

If an employee has worked for 13 weeks or more prior to the date of injury, or if the wage at time of injury has not been fixed or cannot be determined, the wages paid to the employee for 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the average weekly wage for that employee.

Since the claimant worked 13 weeks immediately preceding the accident, the only question the facts present is whether the employment was irregular, under the statute, or whether claimant is an employee who regularly works 30 hours a week, under the rule. The claimant's suspension from work that diminished his hours in two weekly pay periods was correctly considered to be other than a "cause beyond the control of the employee;" Finding of Fact No. 11 that attributed two weeks of work under 30 hours to the suspension was sufficiently supported by the evidence. With only one week under 30 hours because of matters that were not under the control of the claimant, the evidence sufficiently supports Finding of Fact No. 12 that said Rule 128.3 is applicable to this case. Rule 128.3(a) applies to full-time employees who regularly work over 30 hours per week. In addition, Article 8308-4.10(g) does not require a different approach to AWW each time the work is not regular. Only if it would be unreasonable to use Rule 128.3(a) to reach AWW because of the irregularity of the work, must another approach be used. *See also* Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991. As a full-time employee who met the 13 week requirement, claimant's total wages for that period are simply divided by 13 to get AWW. This the hearing officer did and determined that $277.56 was the AWW as shown in Conclusion of Law No. 3. In addition, the number of hours worked during that period and the claimant's gross pay sufficiently support that part of the conclusion that indicates the rate of pay exceeds $8.50 per hour.

Claimant's contention that Rule 128.4, which applies to part-time employees, should apply to him is without merit. The hearing officer has impliedly found that claimant is a full-time employee by correctly applying rules that address full-time employment; therefore requirements to adjust wages upward and to look to a similar employee under Rule 128.4 do not apply. Claimant also cites Lubbock Ind. Sch. Dist. v. Bradley, 579 S.W.2d 78 (Tex.

Civ. App.-Amarillo 1979, writ ref'd n.r.e.) but that case dealt with a worker who had not worked the requisite 210 days prior to an injury under the law prior to the 1989 Act; that case does not control this appeal. Claimant also takes issue with the amount of notice he was given prior to the contested case hearing. (He states he received notice on August 11th for a hearing on August 26th--the rule calls for notice "to be furnished" 20 days before the hearing.) We note that he did not object to this at the hearing, that he has indicated no prejudice thereby, and that this hearing was held after claimant failed to attend the first hearing scheduled on this matter. The notice he received was sufficient.

Claimant also asserts error in Finding of Fact No. 5 which says notice of the first hearing on this matter was mailed to his last correct address of record. Claimant's presence at this hearing, on remand, obviates that concern. While no issue as to notice of the first hearing now controls the appeals panel's review, we note that the record now contains the cover letter of March 23, 1992, which forwarded the benefit review officer's report to the parties and provided notice of date, time, and place of the contested case hearing that claimant failed to attend.

Evidence in the record sufficiently supports all findings of fact and conclusions of law, and the decision and order signed September 4, 1992 are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Appeals Judge

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Susan M. Kelley
Appeals Judge